



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 10, 2004

Ms. Michele Austin
Assistant City Attorney
City of Houston - Legal Department
P.O. Box 1562
Houston, Texas 77251-1562

OR2004-6771

Dear Ms. Austin:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 206762.

The City of Houston (the "city") received a request for the following information relating to evaluations of Best and Final Proposals submitted to the city by retail electric providers:

all emails, notes, drafts, tabulations, worksheets, spreadsheets, tabulations, tallies, votes, meeting minutes, electronic recordings or files supporting or related to the sheet provided entitled 'City of Houston Qualified Retail Electric Provider Best and Final Proposals Evaluation Score Sheet.'

While you raise no exceptions to disclosure on behalf of the city, you state that release of the requested information may implicate the proprietary interests of the third party bidders. Thus you state, and provide documentation showing, that you notified Constellation New Energy, Inc. ("CNE"), Reliant Energy, Inc. ("Reliant"), TXU Energy Retail Company, L.P. ("TXU"), and the Texas General Land Office (the "GLO") of the request and of their right to submit arguments to this office as to why the information should not be released. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (determining that statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under Public Information Act in certain circumstances). We have reviewed the submitted information. We have also considered comments submitted by the requestor. *See* Gov't Code § 552.304 (providing that

member of public may submit comments stating why information should or should not be released).¹

We first address the GLO's claim under section 552.104 of the Government Code. Section 552.104 excepts from required public disclosure "information that, if released, would give advantage to a competitor or bidder." This exception protects a governmental body's interests in connection with competitive bidding and in certain other competitive situations. *See* Open Records Decision No. 593 (1991) (construing statutory predecessor). This office has held that a governmental body may seek protection as a competitor in the marketplace under section 552.104 and avail itself of the "competitive advantage" aspect of this exception if it can satisfy two criteria. *See id.* First, the governmental body must demonstrate that it has specific marketplace interests. *See id.* at 3. Second, the governmental body must demonstrate a specific threat of actual or potential harm to its interests in a particular competitive situation. *See id.* at 5. Thus, the question of whether the release of particular information will harm a governmental body's legitimate interests as a competitor in a marketplace depends on the sufficiency of the governmental body's demonstration of the prospect of specific harm to its marketplace interests in a particular competitive situation. *See id.* at 10. A general allegation of a remote possibility of harm is not sufficient. *See* Open Records Decision No. 514 at 2 (1988).

The GLO asserts that it has specific marketplace interests in the information at issue because the GLO is authorized by statute to "sell or otherwise convey power generated from royalties taken in kind." Tex. Util. Code § 35.102. The GLO advises that under this authority, the GLO has created the State Power Program through which it bids on contracts for the right to sell electrical energy to public retail customers. The GLO states it competes with other private companies for the awards of these contracts. Based on these representations, we find that the GLO has demonstrated that it has specific marketplace interests and may be considered a "competitor" for purposes of section 552.104. *See* Open Records Decision No. 593 (1991).

The GLO also asserts that release of the submitted information would harm its marketplace interests, stating that the submitted information "represents the method by which the GLO will provide and charge for electric energy to its electrical energy customers." The GLO

¹ We note the requestor's letter of July 30, 2004, purports to narrow or clarify the scope of the original request of May 20, 2004. We note, however, that the city did not seek clarification of the request and that the city submitted information which the city considered to be responsive to the May 20 request. Because the city has submitted responsive information and because the arguments we have received from interested third parties pursuant to section 552.305 pertain directly to this information, we will address the claims of the third parties with respect to all of the submitted information. We note that the information submitted by the city for review includes the information the requestor specifically addresses in the July 30 letter; *i.e.*, the March 31, 2004 memo from Sean Tenney to Larry Baker entitled "Evaluation of Best and Final Proposals from Retail Electric Providers" and the March 31, 2004 memo from Phillip T. Golden to Sean Tenney entitled "Evaluation of Best and Final Contract Terms Offered to the City of Houston."

asserts that, if its competitors had access to this information, they would "be able to use the GLO's methods of delivery of electrical services and its pricing formula for such services as their own," and that "competitors could use this information to structure their own proposals for future electrical customers" to better compete against the land office. The GLO states that "working with Reliant [it] is able to offer unique products, services and pricing formulas in the competitive marketplace of electrical energy" and contends that allowing competitors access to this information will undermine the GLO's ability to compete in this marketplace. Based on these representations and arguments, we determine that the GLO has shown that release of a portion of the submitted information, which we have marked, will cause specific harm to the GLO's marketplace interests. *See* Open Records Decision No. 593 (1991). Accordingly, we have marked the information the city must withhold under section 552.104 of the Government Code.

Next, Reliant, CNE, and TXU have submitted arguments contending that portions of the submitted information are excepted from disclosure under section 552.110 of the Government Code. Section 552.110 protects: (1) trade secrets, and (2) commercial or financial information the disclosure of which would cause substantial competitive harm to the person from whom the information was obtained. *See* Gov't Code § 552.110(a), (b). Section 552.110(a) protects the property interests of private parties by excepting from disclosure trade secrets obtained from a person and privileged or confidential by statute or judicial decision. *See* Gov't Code § 552.110(a). A "trade secret"

may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives [one] an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business in that it is not simply information as to single or ephemeral events in the conduct of the business, as for example the amount or other terms of a secret bid for a contract or the salary of certain employees. . . . A trade secret is a process or device for continuous use in the operation of the business. Generally it relates to the production of goods, as for example, a machine or formula for the production of an article. It may, however, relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also* *Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958); Open Records Decision Nos. 255 (1980), 232 (1979), 217 (1978).

There are six factors to be assessed in determining whether information qualifies as a trade secret:

- (1) the extent to which the information is known outside of [the company's] business;
- (2) the extent to which it is known by employees and others involved in [the company's] business;
- (3) the extent of measures taken by [the company] to guard the secrecy of the information;
- (4) the value of the information to [the company] and to [its] competitors;
- (5) the amount of effort or money expended by [the company] in developing this information; and
- (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also* Open Records Decision No. 232 (1979). This office must accept a claim that information subject to the Act is excepted as a trade secret if a *prima facie* case for exemption is made and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 (1990). However, we cannot conclude that section 552.110(a) is applicable unless it has been shown that the information meets the definition of a trade secret and the necessary factors have been demonstrated to establish a trade secret claim. Open Records Decision No. 402 (1983).

Section 552.110(b) protects “[c]ommercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained[.]” Gov’t Code § 552.110(b). This exception to disclosure requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the information at issue. Gov’t Code § 552.110(b); *see also National Parks & Conservation Ass’n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974); Open Records Decision No. 661 (1999).

Reliant, CNE, and TXU seek to withhold customer list information as trade secrets pursuant to section 552.110(a). We have marked the customer list information in the submitted documents that the city must withhold pursuant to section 552.110(a) of the Government Code. Furthermore, CNE and TXU seek to withhold pricing information pursuant to section 552.110(b) of the Government Code. We find CNE and TXU have established that

pricing information is excepted under section 552.110(b).² We also find that CNE has made a specific factual showing that release of portions of the remaining submitted information would cause substantial competitive harm to the company. Thus, we have marked the portions of the submitted information that the city must withhold pursuant to section 552.110(b) of the Government Code. We note that Reliant seeks to withhold scores assigned to the GLO/Reliant proposal by city evaluators pursuant to section 552.110. Upon review of the information at issue and arguments submitted by Reliant, however, we find Reliant has not demonstrated that the scores at issue meet the definition of a trade secret, nor has Reliant demonstrated the necessary factors to establish a trade secret claim for the scores. We also find that Reliant has not made a specific factual showing that release of the scores assigned to the GLO/Reliant proposal would cause substantial competitive harm to Reliant. We therefore determine that the city may not withhold the scores pursuant to section 552.110(a) or (b).

In summary, we have marked the information in the submitted documents that the city must withhold under section 552.104 of the Government Code. We have marked the customer list information of Reliant, TXU, and CNE that is protected as trade secret information and must be withheld pursuant to section 552.110(a) of the Government Code. We have also marked information that must be withheld under section 552.110(b) of the Government Code. The remainder of the information at issue must be released to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within thirty calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within ten calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within ten calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public

² We note that pricing information pertaining to the GLO/Reliant proposal is encompassed by the information the GLO seeks to withhold under section 552.104. Accordingly, we need not reach Reliant's claims under section 552.110 for this information.

records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within ten calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Tex. Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within ten calendar days of the date of this ruling.

Sincerely,



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Assistant Attorney General
Open Records Division

DRS/seg

Ref: ID# 206762

Enc: Submitted documents

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